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No. 90-303

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

LE BUP THI DAO, et al.,

Petitioners,

v.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITIONERS' REPLY MEMORANDUM

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I. Contrary to respondents' claims, there is a pressing need to clarify the Court's recent holding in *Will*.

In their opposition, respondents argue against granting certiorari asserting that "there was no evidence that the individual defendants herein had acted with racial animus when the delays in licensure occurred." Respondents' Brief in Opposition at p. 18, hereafter referred to as "Respondents' Opposition". In fact, as discussed in the Petition for Writ of Certiorari at pages 7 through 9, there is a substantial amount of evidence which shows that respondents suspended the licensing of Vietnamese physicians based on their belief that all physicians trained in Vietnam were "communists," "trained by communists", or, for some unknown reason, categorically unfit to practice medicine in California.[1]

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[1] For example, the evidence in the record below shows that respondent Galal Gough (President of the Board of Medical Quality Assurance and one of the individual defendants in this action) was "very suspicious" of Vietnamese doctors. Grimm Deposition at pp. 133 and 261. Respondent Gough believed that all Vietnamese doctors after the fall of Vietnam were "members of the Communist party" or "trained by communists" and warned that "their training could not be trusted." Declaration of Senator Ed Royce at p. 2 and Gough Deposition at p. 96.

There also is evidence that respondents sought to deny licenses to Vietnamese doctors even when there was no legitimate reason to do so. When respondent J. Alfred Rider (President of the Division of Licensing and another of the individual defendants in this action) was asked by his staff whether Vietnamese doctors would be licensed if an investigation

(Continued on following page)

The facts in this case present a compelling case of invidious discrimination similar to that condemned by then-Circuit Judge Anthony Kennedy in *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied* 449 U.S. 875. Just as city officials, in *Flores*, delayed the issuance of liquor licenses to Hispanic applicants, respondents, here, blocked the licensure of Vietnamese physicians for over two years. Just as city officials, in *Flores*, harbored negative, stereotypical views concerning Hispanic applicants, respondents, here, considered all Vietnamese applicants, "communists," "trained by communists," and unfit to practice medicine in California. Just as the Hispanic applicants, in *Flores*, were entitled to present the facts to a jury and obtain damages for invidious discrimination, the Vietnamese physicians, here, should be allowed the opportunity to go to trial and obtain appropriate relief.

(Continued from previous page)

cleared every credentials and training question, he answered "NO" following which the matter was dropped without dissent from the other members. Grimm Deposition at pp. 294-295.

The evidence also shows that while respondents Galal and Rider were blocking the licensure of Vietnamese physicians, they were taking extraordinary steps to license less qualified, non-Vietnamese applicants. Respondents' unfair and discriminatory efforts were objected to by the staff and the Attorney General, but to no avail. For citations to the record, see Petition for Writ of Certiorari, pp. 9-11, fn. 6-8.

Much of this evidence is in the form of sworn testimony from respondents themselves and from Marc Grimm, the chief staff person assigned to the Vietnamese matter. Over time, Mr. Grimm became so disgusted with respondents' exclusion of the Vietnamese applicants that he agreed to extensive depositions concerning the subject. In their Opposition, respondents have made no effort to refute or even explain the specific facts presented by petitioners.

There is a pressing need to clarify the Court's recent holding in *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304.] (1989). In *Will*, the Court held that damages are unavailable under 42 U.S.C. section 1983 against state officials who are sued only in their official capacity. However, imprecise language in the last sentence of the decision is causing both conflict and confusion.

Since *Will*, cases decided in the First[2], Second[3], Fourth[4], Seventh[5], Eighth[6], and Tenth[7] circuits, North

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[2] *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567, fn. 10 (1st Cir. 1989) and *Jones v. Rhode Island*, 724 F.Supp. 25 (R.I. 1989).

[3] *Al-Jundi v. Estate of Nelson Rockefeller*, 885 F.2d 1060, 1066 (2nd Cir. 1989) ("As an initial matter we note that a section 1983 claim for damages against a state official can only be asserted against that official in his or her individual capacity."); *Santiago v. N.Y. Department of Corrections*, 725 S.Supp. 780 (S.D.N.Y. 1989); *Natural Foods, Inc. v. Rubin*, 727 F.Supp. 104, 107-108 (S.D.N.Y. 1989) ([*Will*] "does not appear to have altered the settled rule that a state official sued in his individual capacity may be held liable for damages.").

[4] *Smith v. Dodrill*, 718 F.Supp. 1293 (N.D. W.Va. 1989) and *Bellamy v. Borders*, 727 F.Supp. 247 (S.C. 1989).

[5] *Grosz v. Indiana*, 730 F.Supp. 1474 (S.D. Ind. 1990).

[6] *Nix v. Norman*, 879 F.2d 429, 433, fn.3 (8th Cir. 1989) ("[S]tate officials are liable for their conduct if sued in an individual capacity.")

[7] *Gray v. University of Kansas Medical Center*, 715 F.Supp. 1041 (Kan. 1989) and *Croft v. Harden*, 730 F.Supp. 342 (Kan. 1989).

Carolina[8], and Kentucky[9] have held that state officials continue to liable for damages under section 1983 when sued in their individual capacity. However, cases decided in the Sixth Circuit[10], Wyoming[11], and now California have held to the contrary.

Because of this conflict, the remedies available under section 1983 now vary from jurisdiction to jurisdiction. Had the present case arose in North Carolina, Kentucky, or the First, Second, Fourth, Seventh, Eighth or Tenth Circuit, petitioners would continue to have a remedy for damages against individual defendants under section 1983. Instead, according to the California Court of Appeal, petitioners have no action for damages under the same federal statute. By granting certiorari, this Court can quickly and definitively resolve this conflict and bring consistency and certainty to this important issue.

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[8] *Harwood v. Johnson*, 388 S.E.2d 139 (N.C. 1990) and *Corum v. University of North Carolina*, 389 S.E.2d 596 (N.C.App. 1990).

[9] *Board of Trustees v. Hayse*, 782 S.W.2d 609 (Ky. 1990).

[10] *Rice v. Ohio Department of Transportation*, 887 F.2d 716, 719 (6th Cir. 1989) ("The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued.") But cf., *Wells v. Brown*, 891 F.2d 592 (6th Cir. 1989) ("We adopt the Eighth Circuit's interpretation of *Will*, which requires that plaintiffs seeking damages under section 1983 set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials.") and *Kolb v. State of Ohio Dept. of Mental Ret. and Dev.*, 721 F.Supp. 885, 895 (N.D. Ohio 1989).

[11] *Buseck v. State*, 785 P.2d 855 (Wyo. 1990).

II. Respondents' analysis of 42 U.S.C. section 1981 is replete with red herrings.

Respondents make a number of spurious arguments concerning section 1981. Respondents contend that "Cases prior to *Jett* and after *Atascadero* made it clear that no damages remedy exists under section 1981." Respondents' Opposition at p. 13. All of the cases cited by respondents in support of this argument involve Eleventh Amendment immunity against damage suits filed in *federal* court. Notwithstanding respondents' confusion about the Eleventh Amendment, these cases have no bearing on the issue before this Court, since this action was brought in *state* court.[12]

Respondents also argue that "Plaintiffs are not entitled to relief because their action under section 1981 is not based upon the making and enforcement of contracts." Respondents' Opposition at p. 16. Respondents rely on *Patterson v. McClean Credit Union*, ___ U.S. ___ [109 S.Ct. 2363].

Respondents ignore the fact that *Patterson* involved a case of discrimination by a *private defendant* and the only right under section 1981 arguably impaired by the private defendant was the right to make and enforce contracts.

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[12] See, *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304, 2307] (1989) wherein the Court recently reiterated that "the Eleventh Amendment does not apply in state courts."

109 S.Ct. at 2372. In addition to the making and enforcement of contracts, section 1981 states that all persons shall have the right

> to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

These rights obviously are directed towards conduct by state agencies and other public entities and were not at issue in *Patterson*. Contrary to respondents' assertions, no court has held that section 1981 is restricted only to the making and enforcement of contracts.

III. Contrary to respondents' suggestions, this case involves important issues concerning the remedies available under the federal civil rights law.

In their opposition, respondents attempt to minimize the effect of their refusal to license Vietnamese physicians and the consequences of the lower court's decision. Respondents suggest that the case is unimportant because "the only licenses which were delayed were those for the four individual plaintiffs, and a few other similarly situated applicants." Respondents' Opposition at p. 21. Petitioners strongly disagree.

After reform legislation was enacted, over 30 fully qualified, Vietnamese applicants who had hitherto been denied their medical licenses became licensed physicians. However, the impact of respondents' refusal to license Vietnamese physicians extended far beyond these applicants. It affected dozens of family members, many of

whom were forced to undergo additional economic hardship during the years that the licenses were unjustly delayed. It also affected the Vietnamese refugee community in California. Because of respondents' actions, that community was denied skilled medical services from physicians who spoke the refugees' language, sympathized with their situation, and understood their culture.

Respondents also suggest that this case is unimportant because it involves an unpublished opinion. Whether reported or not, this case will have great significance in that the California Attorney General who represents respondents here will certainly look to it when advising state agencies and state officials concerning their potential liability for invidious discrimination. If the decision by the Court of appeal is allowed to stand, agencies in California and those who direct them, will be even less inclined to prevent, detect, and halt the type of discrimination which was aimed at petitioners here simply because they were Vietnamese.

In case after case, this Court has rejected the cynical notion that invidious discrimination against a small class of persons is of no concern and gross injustice is permissible in unpublished opinions. Contrary to respondents' suggestions, the State of California's exclusion of applicants from medical licensure because of their race or ethnicity and the remedies available to persons injured by such invidious discrimination is of the highest importance.

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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